UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOMASINO, Appellant, VS. STATE OF CALIFORNIA, Appellee.	No. 71-1076

(November 11, 1971)

Appeal from the United States District Court for the Central District of California

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Before: MERRILL, KILKENNY, and TRASK, Circuit Judges.

PER CURIAM:

While awaiting trial in a state court, Tomasino filed a petition in the United States District Court for removal of his criminal prosecution to the federal court pursuant to 28 U.S.C. §1443(1). He claimed that the statute under which he was being prosecuted (Cal. Veh. Code §23101) was violative of the equal protection clause because punishment for any particular act could vary from that for a felony (a prison term) to that for a misdemeanor (a jail term plus a fine), depending upon the "whim or caprice" of the court.

The State was ordered to respond, and, upon doing so, moved to remand the case to the state courts. A copy of the response, the motion and a proposed order were served upon Tomasino by mail the same day. The following day, without offering appellant an opportunity to respond to the state's motion to remand, the district judge ordered the cause remanded because the peti-

tion for removal failed to state a claim under §1443(1).

Relying on People v. Pobuta, 437 F.2d 1200 (9th Cir. 1971); Potter v. McCall, 433 F.2d 1087 (9th Cir. 1970); and Harmon v. Superior Court, 307 F.2d 796 (9th Cir. 1962), the appellant seeks reversal. See also Saunders v. Veterans Administration, F.2d---(9th Cir. Sep. 29, 1971). We do not depart from the decisions announced in those cases.

But, there are also complaints filed where under no conceivable stretch of the imagination could a proper claim be stated on amendment. See Perdue v. Supreme Court of the United States, 439 F.2d 806 (9th Cir. 1971). Although Perdue is not a §1443 case, it clearly illustrates the distinction we make here. Likewise, this complaint did not state a cause of action. Were the motion to remand to be heard and amendment permitted, it would still not state a claim upon which relief could be granted. Schneider v. California, 427 F.2d 1178 (9th Cir. 1970), appeal dismissed, cert. denied, (ital) 401 U.S. 929 (1971). Under those circumstances, we do not believe that the appellant is deprived of constitutional rights nor is the administration of justice served by requiring the district court to perform a useless exercise. See Greenwood v. Peacock, 384 U.S. 808, 832 (1966).

The order of the district court is affirmed.

MERRILL, Circuit Judge, dissenting:

I dissent and would remand to the District Court on the authority of People v. Pobuta, 437 F.2d 1200 (9th Cir. 1971), for a hearing on appellant's contentions respecting the propriety of removal. I disagree with the majority in its assertion

that the administration of justice would not be served by such action.

I do not approve of our sanctioning ex parte (ital) action of this sort and do not approve of making this exception to the Pobuta rule, narrow though it may be. Ex parte (ital) action here has forced the aggrieved party to take an appeal in order that his contentions may have judicial consideration. It has forced this court to give consideration to those contentions in the first instance. In my view the administration of justice would be served by our making clear to the District Court that our function is to review its rulings upon appellant's contentions. This we can hardly do when appellant has had no opportunity to be heard.

I would suggest to the district courts that, notwithstanding the result here, the better course is to grant a hearing. In future cases panels of this court may not find the answer on the merits to be as obvious as was the case here.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOMASINO, Appellant, VS. STATE OF CALIFORNIA, Appellee.	FILED Dec. 16,. 1971 No. 71-1076

Before MERRILL, KILKENNY, and TRASK, Circuit Judges.

Although the petition for rehearing was not timely filed, permission for such late filing is hereby granted.

Judges Kilkenny and Trask join to deny the petition for rehearing. Judge Merrill would grant the petition for rehearing.

The petition for rehearing is denied.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed
Nov. 13, 1970

TOMASINO, Petitioner, VS. STATE OF CALIFORNIA, Respondent.	No. 6885 ORDER REMANDING CASE TO THE SUPERIOR COURT OF LOS ANGELES COUNTY

The petition for removal fails to state facts showing that petitioner is denied, and cannot enforce, in the state courts of the State of California, any rights secured to him by any law providing for the equal rights of citizens of the United States within the provisions of Title 28, U.S.C.A., Section 1443.

IT IS, THEREFORE, ORDERED that this cause be and the same is, hereby remanded to the Superior Court of the State of California, in and for the County of Los Angeles, for further proceedings. The clerk of the court is directed to serve a copy of this order upon petitioner.

Dated:November 13, 1970.

/s/ David W. Williams
United States District
Judge